87 No. 1295

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

ANDREW SOKOLOW

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a reasonable suspicion that a person is engaged in narcotics trafficking can be based on a commonsense analysis of all the information in the officers' possession, or whether it must be based on at least one factor that constitutes direct evidence of an ongoing crime, plus circumstantial evidence that can be considered only if its significance is verified by empirical or statistical evidence.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on rehearing (App. 1a-33a) is reported at 831 F.2d 1413. The initial opinion of the court of appeals, as amended (App. 34a-46a), is reported at 808 F.2d 1366. The other orders and opinions in the case, including the order of the court of appeals remanding the case for additional factual findings (App. 50a-51a); the opinion of the district court on remand from the court of appeals (App. 47a-49a); the order and opinion of the district court denying respondent's motion to suppress (App. 52a-55a); and the magistrate's report and recommendation (App. 56a-62a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1987. A petition for rehearing was denied on November 4, 1987 (App. 1a). On December 30, 1987, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 2, 1988.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

Following the denial of a motion to suppress evidence in the United States District Court for the District of Hawaii, respondent entered a conditional plea of guilty to the charge of possessing cocaine with the intent to distribute

[1] Along with a petition for rehearing, we submitted a suggestion for rehearing en banc. As of the date of the filing of this petition, the court of appeals has not acted on our en banc suggestion. The time within which to file a petition, however, runs from the date of the denial of a rehearing petition, not from the date of the denial of a suggestion for rehearing en banc. Sup. Ct. R. 20.4. Because the court of appeals denied our rehearing petition on November 4, 1987, in a new opinion that substantially changed the rationale for the court's decision, we filed a supplemental petition for rehearing with a suggestion for rehearing en banc, which is still pending before the Ninth Circuit. We will advise the Court of any further action by the court of appeals that may affect the disposition of this petition.

it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment to be followed by a special parole term of three years. The court of appeals reversed by a divided vote.

1. On July 22, 1984, respondent approached the United Airlines ticket counter at the Honolulu airport.[2] Respondent appeared to be roughly 25 years old; he was wearing a black jumpsuit and a great deal of gold jewelry; and he was accompanied by a woman. He purchased two round-trip tickets to Miami in the names Andrew Kray and Janet Norian with an open return. The price of the tickets was $2100. Respondent paid for the tickets with cash from a large roll of $20 bills that he handed to the ticket agent. The agent counted out $2100, which depleted the roll by about half, and returned the rest of the roll to respondent. Neither respondent nor his companion checked any luggage, although they had four bags with them. Upon request, respondent gave the ticket agent a telephone number. The agent noticed that respondent seemed nervous while he was buying the tickets. App. 2a, 56a; 9/22/86 Tr. 16-18.

After respondent left for his flight, the ticket agent told Officer John McCarthy of the Honolulu Police Department about respondent's cash purchase of the tickets. Officer McCarthy, who was a member of the Department's Airport Task Force, checked the telephone number that respondent had left with the ticket agent and learned that it was listed to a "Karl Herman"; McCarthy was unable to

[2] The facts were developed at suppression hearings conducted by the magistrate and the district court on three separate days. In addition, the parties stipulated to the facts contained in the affidavits of Honolulu Police Officer John McCarthy, which were filed in support of the several search warrant applications in this case. 11/21/84 Tr. 2-3.

find any Hawaii listing under the name "Andrew Kray."[3] The ticket agent identified respondent's voice on a recorded message at the telephone number respondent had left. App. 2a-3a, 56a-57a; 9/22/86 Tr. 18-19, 23; McCarthy Aff. 1.

Officer McCarthy subsequently learned that respondent and Norian were scheduled to return to Honolulu on July 25, three days after they had left. He also learned that on the way back from Miami, they were scheduled to make stopovers in Denver and Los Angeles. On the return trip from Miami, narcotics agents spotted respondent in a waiting area at the Los Angeles airport. They noticed that he "appeared to be very nervous and was looking all around the waiting area" (9/22/86 Tr. 20).

Respondent and Norian arrived in Honolulu at about 6:30 p.m. on July 25. Respondent was wearing the same black jumpsuit and gold jewelry that he wore when the trip began. Once again, he and Norian had checked no luggage but were carrying four bags. Upon deplaning in Honolulu, they walked directly to a street level taxi stand. The narcotics officers who had been watching respondent decided to approach him to examine his identification and airline tickets. App. 3a, 57a; 10/29/84 Tr. 11; 9/22/86 Tr. 19; McCarthy Aff. 1.

At 6:41 p.m., while respondent was waiting for a cab, Drug Enforcement Administration (DEA) Agent Richard Kempshall displayed his credentials, took respondent by the arm, and guided him back onto the sidewalk. App. 47a, 57a; 10/29/84 Tr. 14-16.[4] Agent Kempshall asked

[3] After respondent's arrest, the agents learned that "Karl Herman" was respondent's roommate. App. 2a-3a; 10/29/84 Tr. 3, 10; 9/22/86 Tr. 23-25.

[4] Although the agents denied that they had any physical contact with respondent at that time, the district court, observing that the government has the burden of proof on the issue, found respondent's account of the event, in which he claimed that one of the agents grabbed his arm and guided him back to the sidewalk "reasonably believable" (App. 47a; see 10/29/84 Tr. 14-16).

respondent for his ticket and some identification; respondent replied that he had neither. Respondent told the agents that his name was "Sokolow" but that he was traveling under his mother's maiden name, "Kray." He also claimed that a man named "Marty," whom he had met on the beach, had purchased the tickets for him. App. 3a, 57a; 10/29/84 Tr. 14-16; 9/22/86 Tr. 38-40, 44; McCarthy Aff. 1.

Agent Kempshall then told respondent that his luggage would be examined by a narcotics detection dog, and respondent carried his bags to the airport customs area. At 6:54—less than 15 minutes after the agents had approached respondent—the dog alerted to respondent's brown shoulder bag.[5] The agents then arrested respondent, moved him to the DEA airport office, and sought a warrant authorizing a search of the shoulder bag. In the meantime, a woman with an extensive record of narcotics and prostitution arrests was brought into the office on an unrelated matter. She identified respondent as a person she knew as "Andrew" who had purchased two or three "papers" of heroin a day over the past two years from her supplier. App. 4a, 57a-58a; 10/29/84 Tr. 16-21; 9/22/86 Tr. 51-59, 76; McCarthy Aff. 1.

After the warrant issued, the agents searched the brown shoulder bag but found no narcotics.[6] The agents found some incriminating documents, however,[7] and they had

[5] The dog had correctly identified the presence of controlled substances on hundreds of prior occasions (McCarthy Aff. 1).

[6] Cocaine residue was later found in that bag (9/22/86 Tr. 62, 64).

[7] The agents found airline tickets in the names of Andrew Kray and James Wodehouse for two round trips from Honolulu to Miami, as well as Miami hotel receipts for those trips. The agents also found

the narcotics detection dog re-examine the remaining three bags. That time, the dog alerted to a medium-sized carry-on bag. Because it was then 9:30 p.m., the agents told respondent that they could not obtain a search warrant for the bag until the following morning. They permitted respondent to leave but kept his luggage. At 7:45 a.m. the next day, a second narcotics detection dog also examined the carry-on bag, and that dog also detected narcotics. The agents obtained a warrant to search the bag and found 1,000 grams of cocaine inside it. App. 4a, 58a-59a; 9/22/86 Tr. 62-64, 88-89.

2. Respondent moved to suppress the cocaine. Following an evidentiary hearing, a magistrate recommended that the motion be denied. The magistrate found that the agents had a reasonable suspicion that respondent was involved in drug trafficking when they approached him at the curb outside the airport (App. 56a-62a). The magistrate also found that, once the narcotics detection dog discovered narcotics in respondent's luggage, the arrest of respondent and the ensuing seizure and searches of his luggage were supported by probable cause (*id.* at 60a-61a). The district court agreed with the magistrate and denied respondent's suppression motion (*id.* at 52a-55a).

3. The court of appeals reversed by a divided vote (App. 34a-46a).[8] The court held that respondent was

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handwritten notes that appeared to be records of drug transactions. In respondent's personal address book, the agents found the names and addresses of several individuals who were suspected of drug trafficking. Finally, the agents found the keys to four safety deposit boxes. McCarthy Affs. 2, 3.

[8] Before issuing its decision, the court of appeals remanded the case to the district court and directed the court to make supplemental findings on several specified questions (App. 50a-51a). Following a further evidentiary hearing on remand, the district court reaffirmed the denial of respondent's suppression motion (*id.* at 47a-49a). The district court found that respondent had been detained at the curb (*id.* at 47a), but that the detention was supported by a reasonable suspicion that respondent possessed narcotics (*id.* at 47a-48a).

seized at the curb outside the airport and that the seizure was not supported by a reasonable suspicion (*id.* at 39a-44a). In concluding that the seizure was unlawful, the court separately examined each fact known to the agents who stopped respondent and concluded that none of them amounted to a reasonable suspicion that respondent was involved in narcotics trafficking.

The court found that only one fact gave any support to the agents' suspicion – respondent's purchase of the tickets with a large wad of cash. The court acknowledged that that fact, standing alone, was "close" to "particularized evidence of suspicious activity" (App. 42a). Nonetheless, the court concluded that respondent's $2100 cash purchase of airline tickets was not sufficient, standing alone, to justify stopping respondent, because it did not indicate that he was engaged in criminal activity at that moment (*id.* at 43a). The court therefore held that respondent's detention was illegal and ordered the evidence suppressed.

Judge Wiggins dissented (App. 44a-46a). He found that respondent's $2100 cash purchase of airline tickets "is sufficiently suspicious that the addition of [a] few other relatively anomalous characteristics could support a founded suspicion of illegal activity" (*id.* at 45a). He disagreed with the majority's contention that the cash payment was not evidence of " 'ongoing' criminal activity," since large amounts of cash are often used "to conceal illicit travel patterns, or to buy drugs" (*ibid.*). When respondent's cash purchase was added to the brevity of the trip, Miami's reputation as a known source city for drugs, and the lack of checked luggage, Judge Wiggins concluded that the agents had a reasonable suspicion that respondent was engaged in criminal activity (*id.* at 45a-46a). Judge

Wiggins criticized the majority for looking at "each evidentiary factor discretely." As he put it, the majority should have viewed "the whole mosiac rather than each tile" (*id.* at 46a).

4. On rehearing the government argued that, under *United States* v. *Cortez*, 449 U.S. 411 (1981), the majority had erred by examining each fact known to the agents in isolation rather than by examining "the totality of the circumstances—the whole picture" (*id.* at 417).

The court of appeals filed a new opinion taking a different approach, but again set aside respondent's conviction on the ground that the stop was not supported by a reasonable suspicion that respondent was engaged in criminal conduct (App. 1a-21a). The court concluded that the facts in this case described "not ongoing criminal activity but a class of people that is predominantly criminal" (*id.* at 10a). It concluded that the government had "unwittingly equate[d] evidence of *behavior that a criminal may engage in* with *behavior indicating an ongoing crime*" (*id.* at 8a (emphasis in original)).

The court of appeals segregated the facts that bear on the reasonable suspicion inquiry into two categories: facts describing ongoing criminal activity, and facts describing personal characteristics shared by drug couriers. In the first category, the court placed factors such as a person's use of an alias or his evasive movement through an airport; at least one such factor, the court held, must be present to justify a finding of reasonable suspicion (App. 11a-12a). In the second category, the court placed factors such as cash payment for tickets, a quick trip to and from a major source city, nervousness, manner of attire, and the absence of checked luggage. Those factors, the court held, are merely characteristics shared by drug couriers in general and are not evidence of ongoing criminal conduct (*id.* at 12a). Those factors are relevant, the court held, only

if at least one factor from the first category is present (*id.* at 14a, 19a). Even then, the court further held, agents may rely on factors in the second category only if they can demonstrate with "[e]mpirical documentation" (*id.* at 13a) or "statistical evidence" (*id.* at 14a) that the factor in question does not describe the behavior of "significant numbers of innocent persons" (*id.* at 13a; see also *id.* at 12a).

The court then applied its two-part test to the facts in this case (App. 18a-20a). It found no evidence that respondent had used an alias, despite the discrepancy between the name he gave the airline ticket agent when purchasing the tickets and the name under which his telephone number was listed, since "it is not unusual for persons with different last names to share a common residence and telephone" (*id.* at 18a). The court also discounted respondent's nervousness while waiting for a connecting flight at the Los Angeles airport, because "[t]here is no evidence on the record to indicate that [respondent's] nervousness was indicative of an attempt to evade detection" (*id.* at 19a-20a). In the court's view, "[n]ervousness would appear to be a normal human reaction to air travel today, with the seemingly growing risk of mid-air collision and the near certainty of delays that may interrrupt the plans of travelers" (*id.* at 20a). Having discounted the evidence that respondent was traveling under an alias and that he seemed to be nervous, the court rejected as "unsubstantiated" the government's contention that the combination of all the facts in this case "will rarely, if ever, describe an innocent traveler" (*ibid.*).

Judge Wiggins again dissented (App. 21a-33a). He noted that the detention of respondent "was brief, served the important law enforcement purpose of detecting drug couriers, and lasted no more than necessary to effectuate this purpose" (*id.* at 22a). He stated that in his view the

majority's approach was "overly mechanistic" and "contrary to the case-by-case determination of reasonable articulable suspicion based on *all* the facts" (*id.* at 25a; emphasis in original). Judge Wiggins explained that, "[i]n evaluating the whole picture, a trained officer may draw inferences and make deductions that would escape an untrained observer. Conduct seemingly innocent may, viewed as a whole, appear suspect to one familiar with the practices of drug smugglers and the methods used to avoid detection" (*id.* at 24a). The majority's approach, Judge Wiggins warned, "effectively throttles the efforts of drug enforcement agents to combat escalating narcotics trafficking" (*id.* at 33a) and would render invalid "many, and perhaps all, *Terry* stops that rely upon drug courier profile characteristics" (*id.* at 21a).

In Judge Wiggins' view, the facts known to the agents were sufficient to establish a reasonable suspicion (App. 28a-29a). He placed particular emphasis on respondent's $2100 cash purchase of airline tickets, because "[i]nnocent persons do not characteristically carry thousands of dollars in twenty dollar bills on their persons" (*id.* at 28a). Such a large cash payment is inconsistent with a legitimate business trip, he found, since it does not provide a paper trail for reimbursement or tax deductions (*ibid.*). Judge Wiggins also noted that the brevity of the trip and the lack of checked luggage were inconsistent with a pleasure trip (*id.* at 28a-29a). Finally, Judge Wiggins remarked that respondent's nervous and watchful behavior during the stopover on his return trip is "hardly a sign of an innocent traveler" (*id.* at 29a).

REASONS FOR GRANTING THE PETITION

The court of appeals has erroneously decided a question of great importance to the national effort to halt the transportation of narcotics within this country and from

abroad. Since 1974, the Drug Enforcement Administration has operated a drug courier surveillance program at numerous airports throughout the nation in order to identify and intercept drug traffickers. That program is an important part of the DEA's drug enforcement efforts, because it provides the DEA with the opportunity to intercept narcotics at a point in the distribution chain above the level that can be reached by more traditional undercover operations. Many of the factors present in this case, but discarded by the court of appeals, are ones on which narcotics agents routinely rely when intercepting drug couriers. Accordingly, if the two-part formula adopted by the court of appeals is allowed to stand, the decision in this case will outlaw a large percentage of the "reasonable suspicion" stops of suspected drug traffickers passing through airports within the Ninth Circuit.[9]

1. When the agents stopped respondent as he was leaving the Honolulu airport on July 25, 1984, they knew the following: (1) respondent had left Honolulu three days earlier on a flight to Miami; (2) at the time, he was dressed in a black jumpsuit and was wearing a large amount of gold jewelry; (3) he paid $2100 for two round-trip tickets between Honolulu and Miami; (4) the tickets were for a flight leaving that day, and they carried an open return; (5) respondent paid for the tickets in cash, from a roll of $20 bills that appeared to contain about $4000; (6) he was traveling under a name that did not match the name in which his telephone was listed, even though his voice was on the answering machine that responded at that number; (7) he was nervous when he was buying the tickets; (8) neither he nor his companion checked any luggage although they were carrying four bags with them; (9) re-

[9] Six of the DEA's 28 airport drug courier surveillance programs are located in cities within the jurisdiction of the Ninth Circuit.

spondent's destination, Miami, is the main source city for cocaine in the United States; (10) respondent stayed in Miami only about 48 hours, even though the travel time between Honolulu and Miami is 10 hours each way; (11) he returned to Miami by an indirect route that included two stopovers; (12) he appeared nervous and watchful while awaiting his connecting flight in the Los Angeles airport; (13) he and his companion also checked no luggage on their return flight from Miami; and (14) respondent was still wearing the black jumpsuit and gold jewelry when he arrived in Honolulu.

The court of appeals found that evidence insufficient to constitute reasonable suspicion and to justify a brief investigative stop of respondent, even though the evidence was stronger than the evidence in all four of this Court's previous airport stop cases. See *Florida* v. *Rodriguez*, 469 U.S. 1 (1984); *Florida* v. *Royer*, 460 U.S. 491 (1983); *Reid* v. *Georgia*, 448 U.S. 438 (1980); *United States* v. *Mendenhall*, 446 U.S. 544 (1980). In *Florida* v. *Royer*, for example, eight Members of the Court agreed that the evidence available to the officers was sufficient to establish reasonable suspicion, even though the agents had less evidence than the agents had in this case. See 460 U.S. at 502 (opinion of White, J.); *id.* at 515-516 (Blackmun, J., dissenting); *id.* at 523-524 (Rehnquist, J., dissenting). In *Royer*, the officers learned that Royer was traveling under an alias, that he had paid cash for his ticket, that he had put only a name and not an address on his checked luggage, that he was young and casually dressed, and that he seemed nervous while walking through the Miami airport. In this case, as in *Royer*, the agents had a strong indication that respondent was traveling under an alias, and they knew that he had made a huge cash payment for his ticket, that he was traveling to Miami, that he was young and casually dressed, and that he was nervous in both the

Honolulu and Los Angeles airports. In addition, respondent had not checked any bags at all; his itinerary was bizarre, to say the least; and his pattern of travel suggested neither a business trip nor a vacation.

The factors relied upon by the agents in this case—and discounted by the court of appeals—are factors commonly relied on by other courts of appeals in upholding reasonable suspicion stops. See 3 W. LaFave, *Search and Seizure* § 9.3(c), at 446-447 (2d ed. 1987). Purchasing $2100 worth of airline tickets with a roll of $20 bills is highly unusual. It suggests that an individual wants to avoid leaving a trail of receipts behind him, which in turn suggests that he is not on a legitimate business trip.[10] The agents had reason to believe that respondent was using an alias, which is common among drug couriers.[11] Respondent's destination—Miami—was clearly an important factor because, as Agent Kempshall testified (9/22/86 Tr. 66), Miami is the "granddaddy" source city for cocaine.[12] The brevity of respondent's trip to Miami is also consistent with drug trafficking. Respondent spent 20 hours in transit and only 48 hours at his destination, which makes it un-

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[10] The cash purchase of airline tickets is commonly cited to support a finding of reasonable suspicion. See, *e.g.*, *United States* v. *Espinosa-Guerra*, 805 F.2d 1502, 1508 (11th Cir. 1986); *United States* v. *Hanson*, 801 F.2d 757, 761-763 (5th Cir. 1986); *United States* v. *Williams*, 726 F.2d 661, 663 (10th Cir.), cert. denied, 467 U.S. 1245 (1984); *United States* v. *Jodoin*, 672 F.2d 232, 234 (1st Cir. 1982).

[11] See, *e.g.*, *United States* v. *Espinosa-Guerra*, *supra*; *United States* v. *Hanson*, *supra*; *United States* v. *Palen*, 793 F.2d 853, 857 (7th Cir. 1986); *United States* v. *Puglisi*, 723 F.2d 779, 789 (11th Cir. 1984); *United States* v. *Ehlebracht*, 693 F.2d 333, 336 (5th Cir. Unit B 1982); *United States* v. *Jodoin*, 672 F.2d at 233.

[12] See, *e.g.*, *United States* v. *Haye*, 825 F.2d 32, 34 (4th Cir. 1987) (Miami is a "known source[] of drug supplies"); *United States* v. *Espinosa-Guerra*, 805 F.2d at 1508; *United States* v. *Puglisi*, 723 F.2d at 789.

likely that he went to Miami for a vacation.[13] Respondent checked no luggage, even though he and his companion had four bags with them, which is consistent with the modus operandi of a drug courier, since it allows him to exit the airport terminal quickly.[14] Finally, respondent was nervous when he purchased his tickets, and he nervously scanned the waiting area at the Los Angeles airport while he was en route to Hawaii. Nervousness may be a characteristic shared by many criminals, but it is particularly relevant in the investigation of drug couriers because of their heightened concern about apprehension while they are passing though airports in possession of large amounts of narcotics or cash.[15]

2. In addition to being contrary to prior airport stop cases from this Court and other courts of appeals, the analysis by the court of appeals in this case is contrary to several of the general principles that this Court has set forth in analyzing the Fourth Amendment principles that apply to investigative stops. Since *Terry* v. *Ohio*, 392 U.S. 1 (1968), it has been clear that a law enforcement officer may briefly stop and detain a person for investigative purposes when the officer can point to specific facts that reasonably indicate that the person detained may be in-

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[13] See *United States* v. *Hanson, supra; United States* v. *Palen*, 793 F.2d at 857 (five-day stay in Florida is "a relatively short period of time * * * for a tourist from Alaska"); *United States* v. *Ehlebracht*, 693 F.2d at 336.

[14] See *United States* v. *Espinosa-Guerra, supra.*

[15] Numerous courts have treated nervousness as an important factor in determining the existence of reasonable suspicion. See, *e.g.*, *United States* v. *Borys*, 766 F.2d 304, 311-312 (7th Cir. 1985), cert. denied, 474 U.S. 1082 (1986); *United States* v. *Williams*, 754 F.2d 672, 674 (6th Cir. 1985); *United States* v. *Tolbert*, 692 F.2d 1041, 1047 (6th Cir. 1982), cert. denied, 464 U.S. 933 (1983); *United States* v. *Ramirez-Cifuentes*, 682 F.2d 337, 342 (2d Cir. 1982).

volved in criminal activity, even though the facts known to the officer do not constitute probable cause to believe that the suspect has committed a crime.

Terry and its successors have established three important principles for "reasonable suspicion" cases. *First*, in order to justify stopping a suspect for questioning, a law enforcement officer is not required to eliminate all innocent explanations for the suspect's behavior, or even to determine that the suspect's actions are more likely to be culpable than innocent. Rather, the officer may act when he "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot" (*Terry*, 392 U.S. at 30). That standard demands only "some minimum level of objective justification to validate the detention or seizure." *INS* v. *Delgado*, 466 U.S. 210, 217 (1984).[16] *Second*, in determining whether a set of factors gives rise to reasonable suspicion, it is wrong to consider each factor in isolation and to judge whether, standing alone, it supports a reasonable suspicion. "[T]he essence of all that has been written is that the totality of the circumstances – the whole picture – must be taken into account" when determining if there is a reasonable suspicion that a person is connected with criminal activity. *United States* v. *Cortez*, 449 U.S. 411,

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[16] See *United States* v. *Montoya De Hernandez*, 473 U.S. 531, 541 (1985); *Adams* v. *Williams*, 407 U.S. 143, 145-146 (1972); cf. *United States* v. *Ramsey*, 431 U.S. 606, 612-613 (1977) ("reasonable cause" standard of 19 U.S.C. 482 authorizing customs officers to search imported merchandise is less than probable cause); see generally 3 W. LaFave, *supra*, § 9.3(b), at 431 ("it would seem clear [from *Terry*] that a more-probable-than-not standard is never applicable to a brief stopping for investigation"); *id.* at 432 & n.58 (collecting cases in which courts "quite properly" upheld a *Terry* stop even though the actions observed were consistent with innocent activity).

417 (1981). See also *Terry*, 392 U.S. at 22 ("a series of acts, each of them perhaps innocent in itself * * * taken together [may] warrant[] further investigation"). *Third*, the evidence known to an officer must be viewed, "fact on fact and clue on clue," in light of the inferences and deductions that a trained and experienced officer would reach, "inferences and deductions that might well elude an untrained person." *Cortez*, 449 U.S. at 418, 419.[17]

Rather than simply applying those principles, the court of appeals devised a novel two-part test to be used in assessing reasonable suspicion stops in the airport setting. The effect of that test, however, was to obscure the probative force of the evidence in this case—evidence which, when viewed in a commonsense fashion, amply justified the agents' suspicions that respondent's curious three-day journey between Honolulu and Miami had a criminal purpose.[18]

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[17] See also *United States* v. *Mendenhall*, 446 U.S. 544, 563-564 (1980) (opinion of Powell, J.); *Brown* v. *Texas*, 443 U.S. 47, 52 n.2 (1979) (a trained, experienced officer "is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer"); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 (1975) ("In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling."); *Terry*, 392 U.S. at 27 ("due weight must be given * * * to the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience").

[18] The two-part test devised by the court of appeals recalls the two-part test that this Court formerly applied in making probable cause determinations. See *Spinelli* v. *United States*, 393 U.S. 410 (1969); *Aguilar* v. *Texas*, 378 U.S. 108 (1964). In *Illinois* v. *Gates*, 462 U.S. 213 (1983), the Court rejected that two-part test in favor of a "totality of the circumstances" approach to probable cause. The Court did so because the *Aguilar-Spinelli* test did not permit "a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability)" and "encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that simply cannot sensibly be divorced from the other facts presented to the magistrate." *Id.* at 234-235 (footnote omitted). The two-part test adopted by the court of appeals is subject to precisely the same criticism: it impedes, rather than assists, clarity of analysis of the strength of the evidence adduced in support of the agents' actions.

The court of appeals first divided the factors bearing on reasonable suspicion into two categories: those that indicate ongoing criminal activity, and those that merely reflect conduct that criminals engage in. The court then held that factors from the second category could not justify a finding of reasonable suspicion absent some factor from the first category, and that in order to rely on factors from the second category, the government would have to introduce empirical or statistical evidence establishing that those factors serve to identify criminals, rather than a large number of innocent persons.

The court of appeals' test treats the factors bearing on reasonable suspicion precisely the way *Terry* said they should not be treated. It creates a false dichotomy between direct evidence, which the court of appeals termed evidence indicative of criminal activity, and circumstantial evidence, which the court of appeals termed evidence indicative of criminal character. Factors that indicate that a person is a drug smuggler do so precisely because they tend, to a greater or lesser degree, to be associated with the act of drug smuggling. Thus, the factors bearing on the issue of reasonable suspicion cannot be neatly lumped into one of two categories, as the court of appeals has done in this case.

To divide the factors typically relied on by police into the two categories invented by the court of appeals has the effect of improperly denigrating certain factors. For example, it assigns too little weight to a suspect's nervousness, which the court of appeals placed in the cate-

gory describing criminal character rather than describing ongoing criminal activity. While nervousness in an airport may be exhibited by both drug couriers and innocent persons, it is logically consistent with ongoing criminal activity and is an important factor in an agent's assessment whether an individual is likely to be carrying drugs at a particular time. See, *e.g.*, *Mendenhall*, 446 U.S. at 564 (opinion of Powell, J.); 3 W. LaFave, *supra*, § 9.3(c), at 447. Nervousness is a natural reaction of a courier who is transporting drugs or cash and is looking around the airport for agents who may be conducting surveillance. For a courier, carrying narcotics through an airport is apt to provoke extraordinarily high anxiety, which is likely to manifest itself in demonstrable, albeit subtle, ways.[19]

The court's relegation of the nervousness factor to the second category also disregards the differences among types of nervousness. A person may be ill-at-ease or anxious in an airport without giving rise to suspicion that he is engaged in unlawful activity. On the other hand, when a person is nervous and watchful, as was petitioner during his layover in Los Angeles, his nervousness takes on more significance. It defies common sense to suppose that officers who have spent months or years observing thousands of travelers passing through airports cannot distinguish between the type of nervousness shown by persons who fear apprehension for criminal activity and the

[19] Curiously, the court of appeals in its first opinion – before it had focused on the fact that there was evidence of nervousness in this case – put the nervousness factor in the first category, not the second. See App. 43a (emphasis in original) ("Sokolow's payment in cash is quite unlike a suspect's looking around to see if he was being watched, appearing nervous, taking evasive action, or using an alias while traveling, all of which at least tend to raise a suspicion that criminal activity is going on *at that time*.").

type of nervousness shown by persons who fear air travel. Thus, it is both unrealistic and unresponsive to subtle differences in human behavior simply to lump nervousness as a whole into the category of conduct that does not suggest ongoing criminal activity.

Similarly, the cash purchase of tickets is not simply a characteristic typical of many criminals, as the court of appeals seemed to believe. Instead, it has a logical bearing on the likelihood that the individual is engaged in criminal conduct at the time. Unlike the use of a credit card or a check, the cash purchase of a ticket enables the individual to travel under an alias without disclosing his true identity, and it leaves no paper trail that can tie the traveler to a particular trip.[20]

Not checking luggage is also a technique that is often used to minimize the risk of apprehension in airports, because it enables the couriers to exit the terminal quickly, thereby miminizing the opportunity for airport narcotics agents to observe them. Again, that factor is more likely to be present when the suspect is engaged in criminal activity, and less likely when he is merely taking an innocent trip.

By relegating to second-class status factors such as nervousness, the cash purchase of tickets, and the failure to check baggage, and by requiring empirical proof of the significance of those factors, the court of appeals violated all three of the principles from *Terry* that are set forth above. Requiring empirical proof that particular factors are not associated with large numbers of innocent travelers

[20] Again, the contrast between the court of appeals' first opinion and its second is striking. In the first opinion, the court regarded the cash purchase of tickets as being "close," standing alone, to establishing reasonable suspicion (App. 42a). In the second opinion, however, the cash purchase of tickets had tumbled into the second category of factors and was not considered relevant at all.

ignores the principle from *Terry* that reasonable suspicion does not require the same level of confidence that is required for proof at trial or for a showing of probable cause, but only an articulable basis for believing that criminal activity "may be afoot." It also ignores the principle that the evidence must be considered as a whole and the principle that it must be viewed in the light of inferences that can be drawn by trained law enforcement officers.

Any number of factors, standing, alone, may describe large numbers of innocent travelers as well as a large percentage of drug couriers. For example, wearing casual dress, being young, and not checking baggage certainly describes many travelers, and for that reason one or all of those factors would not be enough, standing alone, to justify an investigative stop. But those factors, in a particular context and in conjunction with other factors, can properly lead trained officers observing the suspect to conclude that there is enough evidence to distinguish that person from the ordinary traveling public to justify a brief detention and inquiry.

Common sense, not statistics, has always been the cornerstone of the Fourth Amendment. The Court has made clear that whether the facts known to a narcotics officer constitute a reasonable suspicion must be determined by the officer's "*common-sense* conclusion about human behavior." *Cortez*, 449 U.S. at 418 (emphasis added). The evidence "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Ibid.* See also *United States* v. *Montoya De Hernandez*, 473 U.S. 531, 542 (1985); *Mendenhall*, 446 U.S. at 563 (opinion of Powell, J.); *Brown* v. *Texas*, 443 U.S. 47, 52 n.2 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 (1975); *Terry*, 392

U.S. at 27.[21] By demanding that experienced narcotics agents justify their commonsense inferences with statistical proof, the court of appeals essentially reformulated the reasonable suspicion inquiry as one that must be examined from the viewpoint of an untrained layman, a perspective flatly inconsistent with the one required by this Court's decisions.

The evidence on which narcotics agents rely cannot be disregarded on the ground that it might not arouse suspicion in a layman. This Court has recognized that a trained police officer is a professional observer of criminal activity and may be "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." *Brown* v. *Texas*, 443 U.S. at 52 n.2. That conclusion is hardly surprising. It should be expected that experienced narcotics agents will be able to discern criminal conduct they have been trained to spot. Indeed, it would make little sense to train agents in drug enforcement if they can stop and question a suspect only on grounds that would be equally obvious to any layman.[22]

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[21] Even in connection with probable cause, the Court has made clear that that no "numerically precise degree of certainty" is necessary (*Illinois* v. *Gates*, 462 U.S. 231, 235 (1983)) and that the question whether probable cause exists must be answered on the basis of the "nontechnical, common-sense judgments of laymen applying a standard less demanding that those used in more formal legal proceedings" (*id.* at 235-236).

[22] The narcotics agents involved in this case had extensive experience in apprehending drug couriers. Officer McCarthy had been a police officer for ten years, he had worked with the Drug Enforcement Administration at the Honolulu airport for two years, and he had participated in more than 300 narcotics investigations, two-thirds of which involved cocaine and most of which occurred at the airport. DEA Kempshall had 15 years' experience and had participated in several thousand narcotics investigations, about half of which involved cocaine. He had been patrolling the Honolulu airport for nar-

Nor can the evidence known to the officers be disregarded on the ground that it was subtle. Narcotics smuggling is a crime of stealth. Unlike the crime in *Terry*, which involved the casing of a store for a robbery, respondent's crime required no action other than concealment and escape for its completion. Respondent's goal was to do as little as possible in order to avoid detection. For that reason, it is hardly surprising that respondent did not engage in conduct that would have been highly suspicious to a lay observer. Only by noticing and piecing together subtle clues can a narcotics agent discern whether a person is transporting drugs, as respondent turned out to be.

3. In sum, the court of appeals' decision in this case is contrary to this Court's decision in *Royer*; it is contrary to the approach employed by other courts of appeals in analyzing airport stop cases; and it is contrary to the principles that this Court has established to guide the application of the Fourth Amendment in the context of "reasonable suspicion" stops. This Court should grant review to resolve those conflicts and to avoid the damage that the decision in this case, if uncorrected, would do to the government's airport narcotics detection program in the Ninth Circuit.

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cotics traffickers since 1979, and was conversant with the methods used to transport narcotics as a result of discussions with fellow agents and with drug couriers. 9/22/86 Tr. 4-6, 26-30, 66-69.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60257